

OAR 860-038-0500 through 860-038-0620 contains the Commission's rules for Direct Access Code of Conduct (Code of Conduct), designed to protect against abuses and anticompetitive practices by electric companies in the Oregon retail electric markets. The Code of Conduct rules govern the sharing of customer information, the cross-subsidization between competitive operations and regulated operations, access to transmission and distribution facilities, joint marketing practices, and other issues.

Analysis

Background

PGE submitted the required Code of Conduct third party compliance report by June 1 in the years 2003, 2005, 2007, and 2011. In 2009, 2013 and 2015, PGE requested a waiver of the requirement to file a third-party review. The Commission waived PGE's 2009 Code of Conduct reporting requirement in Order No. 09-104, its 2013 Code of Conduct reporting requirement in Order No. 13-060, and the Company's 2015 Code of Conduct reporting requirement in Order No. 15-088.

In 2017 and 2019, PGE requested the option to use a report submitted by PGE's Internal Audit Department in lieu of a third-party review. In Order Nos. 17-317 and 19-167 the Commission accepted Staff's recommendation to allow the Company to waive the requirements of OAR-038-0640.

On August 31, 2021, after being granted an extension to the June 1 deadline via Order 21-179, PGE submitted the required Code of Conduct third party compliance report prepared by Deloitte & Touche (Deloitte).

On December 21, 2022, the Company filed its request to waive the Code of Conduct reporting, stating that a 2023 compliance review is not likely to reveal deficiencies with compliance, nor present material opportunities for improved compliance, as evidenced by PGE's demonstrated compliance with the Code of Conduct rules over years.

Summary of Company's Reasons for Waiver

In its Application, the Company provides the following reasons for approving a waiver of OAR 860-038-0640:

1. Circumstances remain substantially similar from the previously granted requests for waiver of compliance with OAR 860-038-0640. Specifically, the Company sought a similar waiver for the 2009, 2013, and 2015 compliance years. The Commission granted waivers in UM 1422 through Order No. 09-104, Order No. 13-060, and Order No. 15-088, respectively.

2. In 2021, PGE engaged Deloitte to audit its compliance with the Code of Conduct, covering the years 2019 and 2020. Deloitte reviewed all aspects of the Code of Conduct, interviewed key personnel, reviewed documentation, reviewed critical processes, and then prepared a report based on these assessments. The report found the Company in compliance with the Code of Conduct rules,¹ and the Company is not aware of any complaints ever being filed with the Commission regarding the Company's compliance.
3. Each of the Company's previously filed reports found that the Company complied with the Code of Conduct. Specifically, prior to 2009, for each odd-numbered year, PGE enlisted an independent third party to review compliance with the Code of Conduct and filed a report detailing such compliance with the Commission. The third-party reviewer typically interviewed key personnel, reviewed documentation, reviewed critical processes, and then prepared a report based on these assessments. The Company filed these reports by June 1 in 2003, 2005, 2007, and 2011. The Company also illustrated compliance with Code of Conduct rules in 2017 and 2019, with internal reviews performed by PGE's Internal Audit Service, as approved by the Commission in Order Nos. 17-317 and 19-167.
4. The Company proactively works to maintain a work environment of awareness and compliance with the Direct Access Code of Conduct rules. PGE's employees in the Company's competitive operations have a heightened knowledge of the Code of Conduct and illustrate a day-to-day vigilance in compliance. The Company also has conducted Division 38 training biennially to targeted employees and departments, including in 2022. The Company also has subject matter experts, both regulatory and legal, available to assist in answering questions or concerns regarding the requirements of Division 38 Direct Access Code of Conduct.
5. PGE did not have any Oregon affiliates² during the period that would be covered by the report due June 1, 2023, thereby lowering the risk that the Company would be found inconsistent with the Code of Conduct. In Docket No. UM 1527, the Commission Staff report, dated April 5, 2011, recommending approval of Pacific Power's 2011 compliance audit waiver agreed "...that the risk of non-compliance with the rules is significantly mitigated..." with the lack of Oregon

¹ See Docket No. UM 1422, *PGE's Compliance per Order No. 21-179, Division 38 Code of Conduct Audit*, Aug. 31, 2021.

² An Oregon affiliate is "an affiliate engaged in the sale or marketing of electricity services or directly related products in an Oregon retail market." See OAR 860-038-0005(44); see also ORS 757.015 for definition of affiliated interest.

affiliates. Staff made similar findings in its reports to the Commission in Docket Nos. UM 1705, UM 1982, and UM 2258.

6. The Company has an immaterial level of three competitive operations including Schedule 54, Large Nonresidential Renewable Energy Certificates Rider, Schedule 320, Meter Information Services, and Schedule 715, Electrical Equipment Services. PGE states due to the immaterial level of competitive operations, in addition to lack of Oregon affiliates, the circumstances driving the need for an audit and report required by the rules are not present.
7. Based on previous reporting preparations, PGE estimates that the independent review and report will cost more than \$65,000, due to the significant resources to coordinate, facilitate, and engage in the review. In addition to this estimated cost, requesting material and arranging for interviews with the Company personnel is a time-consuming and costly undertaking.
8. The Commission maintains the opportunity to review the Company's relationships and transactions with affiliates through various mechanisms. Granting a waiver of the Code of Conduct third-party review and report requirement will not impede the Commission's ability to request information or investigate potential issues.

Summary of Staff's Analysis

Staff reviewed previous UM 1422 Commission Orders granting PGE a waiver of OAR 860-036-0640 and granting approval for internal review by PGE's Internal Audit Service. Staff also reviewed all internal and external Code of Conduct reports, which previously found that "...the Company has satisfactorily complied with the Code of Conduct."³

Staff notes that in Docket No. UM 1422, PGE again requested a waiver of the same rule, for the June 1, 2019, compliance requirement. The waiver was granted but conditioned on PGE's agreement to have its Internal Audit Service review conduct a review for the preceding two calendar years and acknowledgment that the Company has no expectation of a waiver in 2021. In conditioning approval, Staff noted developing trends related to direct access, including a 2018 OPUC legislative report⁴ highlighted developing trends and new technologies related to Direct Access. To this end, Staff

³ See Docket No. UM 1422, Commission Order No. 19-167, *Application for Waiver of OAR 860-038-0640, Compliance Filing Requirements for 2019*, May 7, 2019.

⁴ Oregon Public Utility Commission, *SB 978 Actively Adapting to the Changing Electricity Sector*, September 2018, available at <https://www.puc.state.or.us/Renewable%20Energy/SB978LegislativeReport-2018.pdf/>.

conferred with PGE and affirmed the need for a baseline audit considering the changing landscape around Direct Access.

In 2021, Deloitte performed the third-party audit for PGE's compliance with OAR 860-031-0500 through 860-038-0620 for the audit period of January 1, 2019 through December 31, 2020, and submitted the results to the Commission on August 31, 2021. Staff reviewed the Deloitte audit as part of its analysis, confirming Deloitte's findings of PGE's compliance with the Direct Access Code of Conduct for 2019 and 2020.⁵ In general, Staff found that the 2021 Code of Conduct Compliance Report illustrated PGE maintains a sufficient compliance program, has no instances of the Company not meeting Division 38 requirements, and continues to actively monitor compliance.⁶

The 2021 Deloitte audit appears to illustrate both compliance on the part of PGE and the absence of any substantial changes to the Company's Direct Access operations. PGE's previous reports, including the 2021 Deloitte audit, and waivers demonstrate the Company's consistent compliance with the Code of Conduct. As such, Staff agrees with the Company that the reasons demonstrating "good cause" for the waiver of OAR 860-038-0640 for June 1, 2023, are still valid.

As part of this Docket, Staff reviewed recent changes to the Direct Access Code of Conduct, resulting from House Bill 2021. Staff specifically reviewed changes to ORS 757.464 and found no immediate changes to the statutory law which would impact PGE's compliance waiver. Staff also notes that the Commission is currently investigating Direct Access across all utilities in Docket No. UM 2024 and Docket No. AR 651. To the extent that this investigation will provide additional information into utility Direct Access programs and potential modify some standards and practices, Staff finds a waiver for the June 1, 2023, reasonable. Depending on the degree to which the Company's Direct Access programs change as a result of UM 2024 and AR 651, Staff may find merit in the audit requirement on Code of Conduct compliance in subsequent years. Staff also maintains authority to monitor and investigate PGE's compliance with the Code of Conduct if ongoing Commission investigations yield modifications to direct access programs and practices.

Conclusion

Staff finds that the risk of PGE's non-compliance with OAR-038-0640 is low and acknowledges that the Company was in compliance with the Direct Access Code of

⁵ See Docket No. UM 1422, *PGE's Compliance per Order No. 21-179, Division 38 Code of Conduct Audit*, Aug. 31, 2021.

⁶ *Id.*

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Conduct as recently as 2019 and 2020 as determined by an independent third party. Staff agrees with the Company and with Staffs' prior conclusions that the risk of non-compliance is minimal due to the Company's internal processes in place and the Company's lack of Oregon affiliates.

PROPOSED COMMISSION MOTION:

Approve PGE's request for waiver of the compliance requirement contained in OAR 860-038-0640 for June 1, 2023.

CA3 UM 1422